The Extraterritorial Reach of Section 10(B): Revisiting Morrison in Light of Dodd-Frank

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Abstract

This Note argues that the conduct-and-effects test set out in Dodd-Frank should not extend to private rights of action under §10(b) of the Exchange Act. Part I discusses three principle ideas key to understanding US securities law and its extraterritorial application: the framework of US regulations surrounding securities fraud; the availability of a private right of action in the United States and how it compares with the regulatory regimes of other countries; and the presumption against extraterritoriality in American law. Part II explains the conflicting tests that currently exist in American jurisprudence regarding the extraterritorial reach of §10(b): the conduct-and-effects test in Dodd-Frank and the bright-line transactional test articulated in Morrison. Finally, Part III argues that the SEC study required by Dodd-Frank should conclude that the proposed test in Dodd-Frank is inappropriate for determining the availability of §10(b) to a private class action involving non-US parties and, instead, the transactional test articulated in Morrison should be upheld.
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INTRODUCTION

In July 2010, the US Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in response to a need for financial regulatory reforms in the wake of the 2008 global economic recession. Dodd-Frank attempts to introduce policies that better promote investor protection, including strengthening the powers of the Securities and Exchange Commission ("SEC") by extending the reach of the SEC's enforcement powers beyond US territory.

Just before Dodd-Frank was enacted, the US Supreme Court decided Morrison v. National Australia Bank Ltd., an "f-cubed" class action grounded upon § 10(b), the anti-fraud provision, of...

An "foreign-cubed," or "foreign-cubed," securities class action is a private cause of action in which a non-US plaintiff sues a non-US issuer in US federal court over transactions that occurred abroad. The US Supreme Court dismissed the plaintiffs' claim in *Morrison* because the securities involved were not purchased in the United States.

*Morrison* completely dismisses years of jurisprudence on the extraterritorial reach of § 10(b) of the Exchange Act. Before *Morrison*, extraterritoriality was determined on a case-by-case basis, following the "conduct test," the "effects test," or a combination of both. Dodd-Frank, however, effectively imposes a "conduct-and-effect test" for cases involving non-US securities brought by the SEC. Whether or not this test extends to private rights of action is left unresolved, as Dodd-Frank only commissions the SEC to conduct a study on whether the reach of the conduct-and-effect test should be extended.

Meanwhile, international capitals including London and Paris are concerned that an SEC study regarding the extension of § 10(b) via the conduct-and-effect test could be the first step toward the United States becoming a "global financial policeman" through class action lawsuits brought in US courts.

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5. *Morrison*, 130 S. Ct. at 2888 ("This case involves no securities listed on a domestic exchange, and ... the purchases complained of ... occurred outside the United States. Petitioners have therefore failed to state a claim on which relief can be granted.").

6. See *infra* Part II.B. for a full discussion of *Morrison*.

7. See *infra* Part II.A. for a discussion on the conduct test and the effects test.


9. See *Dodd-Frank Act* § 929Y (requiring the SEC to conduct a study on whether or not the conduct-and-effect test should be extended to private rights of action).

The securities class action is a key feature of US securities law. Considering that the United States' position as a leader in the financial market is precarious, in part due to a notoriously capricious legal system, the US Congress and the SEC must establish a framework that clearly delineates what is expected of participants in the US securities market. This is emphasized by the rise of multiple listings, global securities offerings, and other cross-border financing activity that could draw international parties before US courts.

This Note argues that the conduct-and-effects test set out in Dodd-Frank should not extend to private rights of action under § 10(b) of the Exchange Act. Part I discusses three principle ideas key to understanding US securities law and its extraterritorial application: the framework of US regulations surrounding securities fraud; the availability of a private right of action in the United States and how it compares with the regulatory regimes of other countries; and the presumption against extraterritoriality in American law. Part II explains the conflicting tests that currently exist in American jurisprudence regarding the extraterritorial reach of § 10(b): the conduct-and-effects test in Dodd-Frank and the bright-line transactional test articulated in Morrison. Finally, Part III argues that the SEC study required by Dodd-Frank should conclude that the proposed test in Dodd-Frank is inappropriate for determining the availability of § 10(b) to a private class action involving non-US parties and, instead, the transactional test articulated in Morrison should be upheld.

(commenting upon the position of international governments on the extraterritoriality provisions in the Dodd-Frank Act); Kellye Y. Testy, Comity and Cooperation: Securities Regulation in a Global Marketplace, 45 Ala. L. Rev. 927, 957 (1994) (explaining that extending US securities law would do little to improve the “already problematic image of American pomposity”).

11. See infra Part I.B. for a discussion of securities class actions.
I. GLOBAL SECURITIES LITIGATION

Jurisdictions regulate their securities industries in whatever manner they find appropriate and accordingly, each jurisdiction has its own particular approach to enforcing its regulations. American securities regulation, and the enforcement thereof via private litigation, has been the subject of much commentary. Commentary extolling its strengths and denouncing its weaknesses informs the conflict between Dodd-Frank and Morrison. This Part provides an overview of concepts underpinning the conflict between Dodd-Frank and Morrison regarding the appropriate test to determine extraterritoriality in private rights of action. First, Section A provides a synopsis of US securities law, specifically its anti-fraud mechanisms. Next, Section B discusses the private right of action implied under § 10(b) and its use in the United States, as compared to regulatory schemes available elsewhere. Last, Section C provides an overview of the longstanding presumption against extraterritoriality in American law.

A. Framework of US Securities Laws

The United States has a fairly robust system of financial regulations. Players in the financial market have to abide by, among others, the Securities Act of 1933, the Exchange Act, the Investment Advisor Act of 1940, the Sarbanes-Oxley Act of 2002, and now, Dodd-Frank. Collectively, these rules exist under the auspices of the SEC to maintain market integrity by protecting

14. See Choi & Guzman, supra note 2, at 207 (recognizing the complexity and intricacy of the US securities regulatory regime); see also About the SEC, supra note 2 (providing an overview of the regulations governing the US securities industry).

investors from fraud. The SEC engages in efforts to promote truth, honesty, and fair dealing.

The Securities Act of 1933 requires issuers to register their securities, subject to certain exceptions, with the SEC. Meanwhile, the Exchange Act created the SEC and gave it disciplinary powers. The Exchange Act regulates secondary trading involving stock exchanges. Section 10(b) of the Exchange Act makes it unlawful for "manipulative or deceptive device[s] or contrivance[s]" to be used in connection with "the purchase or sale of any security" listed on a national securities exchange.

The SEC promulgated Rule 10b-5 under its authority to prescribe rules and regulations as necessary. Together, § 10(b)

16. See About the SEC, supra note 2 ("[T]he SEC is concerned primarily with ... maintaining fair dealing, and protecting against fraud."); Richard C. Breeden, Foreign Companies and U.S. Securities Markets in a Time of Economic Transformation, 17 FORDHAM INT'L L.J. S77, S82 (1994) ("[W]e have managed to build arduously a system . . . of extraordinary confidence in the fundamental integrity of the U.S. market.").

17. See About the SEC, supra note 2; see also Breeden, supra note 16, at S81 ("[T]he most important factor of all is strong public confidence in the honesty and integrity of the U.S. market.").


21. 15 U.S.C. § 78j (2006). Section 10(b) forbids: any person, directly or indirectly, by the use of any means . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange[,] . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

22. See id. (stating that the SEC may prescribe rules and regulations "as necessary"); see also United States v. O'Hagan, 521 U.S. 642, 651 (1997) ("The [SEC] adopted Rule 10b-5 pursuant to its § 10(b) rulemaking authority . . . ")
and Rule 10b-5 prohibit manipulation or deception in the exchange of any security.\textsuperscript{23} Disgorgements of profits and criminal penalties collected by the SEC are generally distributed to injured investors.\textsuperscript{24}

Dodd-Frank adds an extraterritoriality provision to § 10(b).\textsuperscript{25} Before Dodd-Frank, whether or not § 10(b) applied to non-US issuers, or whether it governed transactions that took place abroad, was unclear.\textsuperscript{26} Nevertheless, US federal courts had previously extended § 10(b) both in cases where the SEC sought to enforce the anti-fraud provision, and where private individuals sought to recover damages from issuers in contravention of the statute.\textsuperscript{27} Prior to Dodd-Frank and Morrison, if the fraudulent conduct had taken place in the United States ("conduct test"), or some effect of fraudulent conduct reached the United States ("effect test"), then the alleged non-US fraudulent issuer could be sued in US district court under § 10(b).\textsuperscript{28} These tests applied to both private plaintiffs and the SEC.\textsuperscript{29}

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\item[23.] See 17 C.F.R. § 240.10b-5(b) (2010). Rule 10b-5 makes it unlawful for: any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. Id.
\item[26.] See Buxbaum, supra note 13, at 17 (stating that the multinational securities class action raises "especially thorny jurisdictional questions"); see also Choi & Guzman, supra note 2, at 215 (describing the various provisions that do and do not extend jurisdiction).
\item[28.] See Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968), (introducing the effects test) abrogated by Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869 (2010);
Dodd-Frank now clarifies the jurisdiction of the US federal courts with regard to the SEC’s power to enforce § 10(b) against non-US issuers participating in international stock exchanges:

The district courts of the United States . . . shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States . . . involving (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.30

Dodd-Frank, however, does not merely reinstate a repackaged version of the pre-Morrison conduct test or the effects test.31 Dodd-Frank only compels the SEC to conduct a study on whether this test should be extended to private rights of action, which may potentially supersede Morrison.32 Dodd-Frank does not explicitly supersede Morrison.33 Congressional records, however, show that leading advocates of the investor protection sections of Dodd-Frank intended to rebut the presumption against extraterritoriality that Morrison upholds34 The Dodd-Frank Act only clearly rebuts that presumption for cases brought forward by the US government.35

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Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972), (introducing the conduct test) abrogated by Morrison, 130 S. Ct. 2869.


30. Dodd-Frank Act § 929P.

31. See id. (specifying that the conduct-and-effects test applies to actions instituted by the SEC).

32. See id. § 929Y.

33. See Conway, supra note 10 (stating that “neither provision [of Dodd-Frank] overturns [Morrison]”). See generally Dodd-Frank Act § 929Y (providing only that the SEC conduct a study on the scope, implications, and costs of the conduct-and-effects test).

34. See 156 CONG. REC. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski) (stating that the purpose of Dodd-Frank Act § 929P is to rebut the presumption against extraterritoriality espoused in Morrison). Rep. Paul Kanjorski of Pennsylvania was among the group of lawmakers that spearheaded the investor protection sections of the Dodd-Frank bill, and drafted Section 929P of the Dodd-Frank Act. Id. at H5235-5237.

35. Dodd-Frank Act § 929P(b).
Section 929(Y) of Dodd-Frank lists the following factors for the SEC to consider in conducting its study on the extension of the conduct-and-effect test to private rights of action:

(1) the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise; (2) what implications such a private right of action would have on international comity; (3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and (4) whether a narrower extraterritorial standard should be adopted.36

The SEC has since issued a request for comments on this issue.37 Until this study is completed, a private party cannot sue a non-US issuer in US district court for transactions that did not take place in the United States.38

B. Securities Class Actions

This Section discusses the private right of action available under American law, and how it is susceptible to abuse, thereby affecting the United States’ market power. This Section also presents other jurisdictions’ approaches to civil litigation and securities regulation by way of comparison.

1. The Private Right of Action under US Law

The US Congress has never expressly authorized private rights of action under § 10(b), but courts have found a private right of action implied in the words of the statute.39 In a private action, the plaintiff must prove “(1) a material misrepresentation

36. Dodd-Frank Act § 929Y(b).
38. See id. at 66, 822-23; see also Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010) (imposing a transaccional test to determine whether or not § 10(b) applies).
39. See Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (“Though the text of the Securities Exchange Act does not provide for a private cause of action for § 10(b) violations, the Court has found a right of action implied in the words of the statute . . . .”); see also Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (recognizing the private right of action implied under § 10(b)).
or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."\(^{40}\) Unlike private litigants, such as individual investors, the SEC does not have to show reliance, economic loss, or causation.\(^{41}\) The SEC also has the authority to pursue cases of attempted fraud.\(^{42}\)

The US Supreme Court has previously been sensitive to the expansion of the private right of action because it is a judicial construct.\(^{43}\) This is true despite Congress’ acceptance of the § 10(b) private right illustrated by the enactment of the Private Securities Litigation Reform Act of 1995 (“PSLRA”), the procedural framework governing securities class actions.\(^{44}\) The PSLRA imposes additional requirements beyond the structure established by Rule 23 of the Federal Rules of Civil Procedure.\(^{45}\) Congress was concerned that the class action mechanism actually benefited plaintiffs’ attorneys more than the plaintiffs themselves.\(^{46}\) The PSLRA thus sought to introduce substantive changes in securities litigation in an effort to curb abusive litigation with frivolous claims designed to extort settlements from companies.\(^{47}\)

\(^{40}\) See Stoneridge, 552 U.S. at 157.

\(^{41}\) See Sec. & Exch. Comm’n v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985) (stating that the SEC need not prove reliance, causation, or pecuniary loss); see also Sec. & Exch. Comm’n v. Adoni, 60 F. Supp. 2d 401, 405 (D.N.J. 1999) (citing Blavin, 760 F.2d at 711).

\(^{42}\) See, e.g., Sec. & Exch. Comm’n v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977) (finding that the text of § 10(b) does not require the successful accomplishment of a fraudulent scheme as a precondition to liability); Kuchnert v. Texstar Corp., 412 F.2d 700, 704 (5th Cir. 1969) (“[W]e are not convinced of any difference . . . between a successful fraud and an attempt.”).

\(^{43}\) See Stoneridge, 552 U.S. at 164 (acknowledging that the Supreme Court has approached the § 10(b) private right with caution as it is not provided in the statute).

\(^{44}\) See id. at 166 (“It is appropriate for us to assume that when [the PSLRA] was enacted, Congress accepted the § 10(b) private cause of action . . . .”)


\(^{46}\) See H.R. REP. No. 104-369, at 32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731 (stating that the PSLRA would "protect[] investors who join class actions against lawyer-driven lawsuits . . . ."); see also Buxbaum, supra note 13, at 26 (noting claims that class actions were enriching plaintiff’s attorneys).

\(^{47}\) See Buxbaum, supra note 13, at 26 n.42. Such changes included heightened pleading requirements, safe harbors for forward looking statements, and eliminated some derivative liability for securities violations. See id. at 26–27. See generally 15 U.S.C. § 78u-4 (2006).
alone can increase the settlement value of even meritless claims.\textsuperscript{48} Although it has long been argued that the class action mechanism is useful in holding companies accountable, a recent study suggests that securities class-action suits do not bolster share value, and may drive down share price even further.\textsuperscript{49}

2. The Effects of Abusive Litigation on US Market Power

Abusive class action suits have been deemed detrimental to the United States' position as a leader in the global financial market.\textsuperscript{50} Thus, there are additional policy considerations that shape the debate on extraterritoriality, related to the United States' economic well-being.\textsuperscript{51} The United States' complicated approach to securities litigation imposes economic risks upon potential issuers.\textsuperscript{52} Every facet of a regulatory or legislative framework introduces additional considerations that issuers have to take into account in deciding whether or not to cross-list their securities in American stock exchanges.\textsuperscript{53} This, in turn, affects

\textsuperscript{48} See, e.g., Stoneridge, 552 U.S. at 163 ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740 (1975) (stating that there are complaints that have settlement value to plaintiffs despite being objectively difficult to win at trial).


\textsuperscript{51} See id. at 73 (stating that the extraterritorial reach of US securities law is a concern when evaluating the US legal system); see also Buxbaum, supra note 13, at 63 (stating that those concerned with the competitiveness of US financial markets consider the application of US securities law to non-US claimants to be a drawback).

\textsuperscript{52} See New York Report, supra note 50, at 75 (recognizing that corporate executives are concerned about the "high legal cost of doing business in the US financial [market]"); see also Buxbaum, supra note 13, at 63 ("[I]n the securities field in particular, an expansive approach to multinational litigation presents a specific economic risk.").

\textsuperscript{53} See New York Report, supra note 50, at 78 ("Striking the right regulatory balance is crucial for any financial center . . ."); see also Buxbaum, supra note 13, at 63 (stating that a jurisdiction's approach to litigation is relevant to a company's decision on where to list their shares).
the performance of the US financial markets, and the ability of American investors to diversify their portfolios.\textsuperscript{54}

It has been suggested that London has taken over New York’s role as the world’s leading financial center, followed by Sydney.\textsuperscript{55} New York, the United States’ financial center, has attributed its decline in global financial leadership to the United States’ complicated financial regulatory framework and a legal environment that does not adequately deter frivolous litigation.\textsuperscript{56} The US legal environment is already seen as expensive and unpredictable, comprised of litigious participants forcing the securities industry to bear a significant chunk of associated costs.\textsuperscript{57} These concerns might be quite significant to non-US issuers, and could interfere with the competitiveness of US financial markets.\textsuperscript{58} Making the private right of action under § 10(b) available to investors involved in predominantly international transactions, such as “f-cubed” transactions, would be the type of legal cost that a non-US issuer might find too great, to the detriment of the US markets.\textsuperscript{59}

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\item \textsuperscript{54} See Choi & Guzman, \textit{supra} note 2, at 224–25 (arguing that extending the reach of American securities law beyond the United States hinders American capital markets); see also Buxbaum, \textit{supra} note 13, at 69 (suggesting that US investors may benefit from having a wide variety of investments to choose from in building their portfolios).
\item \textsuperscript{56} See New York Report, \textit{supra} note 50, at i–ii (stating that New York, and the US, must take proactive steps to compete with other jurisdictions, which have more organized regulatory principles).
\item \textsuperscript{57} See New York Report, \textit{supra} note 50, at 74 (“The propensity toward litigation . . . is of particular importance to the securities industry, which in recent years has borne a disproportionate share of the overall cost.”). Meanwhile, Member States of the European Union have expressed their commitment to consistent applications of the law while reducing the burden of regulatory costs to the securities industry. Jochen Sanio, President, Fed. Fin. Supervisory Auth. of Ger., Opening Remarks at the European Financial Forum: The EU’s Changing Capital Market (Dec. 1, 2007).
\item \textsuperscript{58} See New York Report, \textit{supra} note 50, at 79 (explaining that the increasingly broad reach of US securities laws hampers the competitiveness of US markets); see also Buxbaum, \textit{supra} note 13, at 63 (stating that a jurisdiction’s approach to litigation is relevant to a company’s decision on where to list their shares).
3. Differing Views on Civil Litigation

The US civil litigation system has been considered “anticompetitive and too entrepreneurial.”\(^{60}\) International comity is a significant issue underlying the question of extraterritoriality.\(^{61}\) Jurisdictions across the globe differ from the United States in a number of ways that would affect a party’s substantive and procedural rights. For example, the British legal system requires the losing party to pay for the winning party’s legal fees, and awards only compensatory damages.\(^{62}\) The US legal system places no such additional burden upon the losing party, permits punitive damages, and allows attorneys to be paid on a contingency basis.\(^{63}\) Moreover, private rights of action grounded in British securities law do not typically involve a jury trial.\(^{64}\) Thus, the United States is an attractive forum for investors, given its active plaintiff’s bar, the economies of scale achieved in litigating smaller claims en masse via class actions, and, specific to

\(^{60}\) Mark A. Behrens et al., *Global Litigation Trends*, 17 *Mich. St. J. Int’l L.* 165, 166 (2009); *see also* Buxbaum, *supra* note 13, at 63 (stating that the US style of lawyering is entrepreneurial).

\(^{61}\) *See* Dodd-Frank Act § 929Y (listing international comity as a factor for the SEC’s consideration in extending the conduct and effects test to private securities class actions).

\(^{62}\) *See* UK Amicus Brief, *supra* note 58, at 10–11. The “loser pays” rule is the predominant rule outside the United States, particularly in Europe. Behrens, *supra* note 60, at 183.

\(^{63}\) See Richard L. Markus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 *Am. J. Comp. L.* 709, 709–10 (2005) (giving examples of procedural characteristics unique to American litigation); *see also* UK Amicus Brief, *supra* note 59 at 10–11 (emphasizing differences between the American and British civil litigation systems).

\(^{64}\) *See* UK Amicus Brief, *supra* note 59, at 11 (“Trial by jury is rare in U.K. private securities fraud litigation.”). UK courts can refuse a jury trial where a prolonged examination of documents or accounts cannot be conveniently made with a jury present. *See* Markus, *supra* note 63, at 713.
securities litigation, that the reliance element is presumed in a § 10(b) class action.\textsuperscript{65}

As a result of the increasingly global nature of commerce, and changing attitudes in favor of protecting consumer interests, there has been widespread reform in the area of aggregative litigation.\textsuperscript{66} Most of Europe and South America have been moving toward recognizing actions with multiple plaintiffs.\textsuperscript{67} Examples include class actions, group actions, and representative actions by consumer or public organizations.\textsuperscript{68} While this trend is growing, opt-out procedures, contingency fees, and punitive damages remain generally prohibited.\textsuperscript{69} Certain countries have also specifically declined to extend multi-claimant litigation in the realm of securities fraud.\textsuperscript{70}

4. Comparative Securities Regulations

There are also substantive differences among various countries' securities regulations. For instance, nations disagree

\textsuperscript{65} See Nathan Koppel & Ashby Jones, Securities Ruling Limits Claims of Fraud, WALL ST. J., Sept. 28, 2010 at CI (stating that the US courts have a reputation of being plaintiff-friendly); see also Buxbaum, supra note 13, at 61–64 (describing conflicts between the United States’ approach to class action litigation and those of other jurisdictions); White, supra note 4, at 102–03 (stating that US courts are an attractive forum for plaintiffs because litigation is more accessible, and that the burden of proving individual reliance in other jurisdictions remains with the plaintiff).

\textsuperscript{66} See Behrens et al., supra note 60, at 167–68 (explaining that there has been growth in the area of aggregative litigation in other countries for a number of reasons, including the globalization of commerce and a policy shift towards consumer protection); see also White, supra note 4, at 104–05 (stating that class actions have been introduced in a number of other jurisdictions).

\textsuperscript{67} See Behrens et al., supra note 60, at 167–68 (explaining that “[m]any countries, including most European and several South American nations, now recognize some form of multiclamaint litigation”); see also White, supra note 4, at 104 (listing countries that have begun to form class action mechanisms).

\textsuperscript{68} See Behrens et al., supra note 60, at 193 (providing examples of developing multi-claimant litigation); see also Deborah R. Hensler, The Globalization of Class Actions: An Overview, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 13 (2009) (stating that aggregative procedures available elsewhere may come with limitations, while some are as broad as US class actions).

\textsuperscript{69} See Behrens, supra note 60, at 193; see also Buxbaum, supra note 13, at 63 (stating that aspects of the US civil litigation system, such as contingency fees and opt-out procedures, are not allowed in other jurisdictions).

on what constitutes actionable securities fraud.\(^{71}\) Elements of a securities fraud claim may also be defined differently.\(^{72}\) Finally, certain jurisdictions prefer to approach securities fraud publicly, via law enforcement, rather than via private litigation.\(^{73}\) This is a result of the dichotomy between civil law and common law systems: civil law systems prefer the primacy of legislation over judge-made law.\(^{74}\)

These divergent views raise questions of duplicate recovery and forum shopping across jurisdictions.\(^{75}\) In jurisdictions where a US judgment is not recognized, the issuer may have to defend itself more than once if the plaintiff is permitted to sue in more than one forum.\(^{76}\) Conversely, an international plaintiff may be forcibly included in a lawsuit that he does not want to be part of, and later be precluded from bringing a claim on his own.\(^{77}\)

\(^{71}\) See Testy, supra note 10, at 957 (stating that nations have different views on securities fraud and securities regulation, with only classic cases of deceit and manipulation as possible instances of fraud that would be actionable in all jurisdictions); see also, Steven R. Salbu, Regulation of Insider Trading in a Global Marketplace: A Uniform Statutory Approach, 66 Tul. L. Rev. 837, 837-39 (1992) (noting differences in insider trading laws among the United States, the European Economic Community, and Japan).

\(^{72}\) See, e.g., Buxbaum, supra note 13, at 61 ("[T]he United States is unusual in recognizing presumed reliance . . . ."); UK Amicus Brief, supra note 59, at 16 (raising the definition of materiality, as in material disclosures, as an example where policy-makers can differ); European Associations Amicus Brief, supra note 69, at 24 (citing examples of how Swiss law differs from American law, including divergent definitions of "material" facts, and the absence of a rebuttable presumption of causation).

\(^{73}\) See Buxbaum, supra note 13, at 61 (stating that there are countries that would rather have public proceedings than private litigation to enforce their laws); see also White, supra note 4, at 105 (stating that civil law countries prefer legislation rather than litigation when it comes to law enforcement).

\(^{74}\) See Buxbaum, supra note 13, at 61 (stating that there are countries that would rather have public proceedings than private litigation to enforce their laws); see also White, supra note 4, at 105 (stating that civil law countries prefer legislation rather than litigation when it comes to law enforcement).

\(^{75}\) See Daniel S. Kahn, The Collapsing Jurisdictional Boundaries of the Antifraud Provisions of the U.S. Securities Laws: The Supreme Court and Congress Ready to Redress Forty Years of Ambiguity, 6 N.Y.U. J. L. & Bus. 365, 413 (2010) (raising concerns of multiple recoveries against the same defendant in different jurisdictions); see also Buxbaum, supra note 13, at 60-61 (recognizing that conflicting approaches to class actions issues relating to duplicate recovery and forum-shopping).

\(^{76}\) See Kahn, supra note 74, at 413 (raising concerns of multiple recoveries against the same defendant in different jurisdictions); see also Buxbaum supra note 13, at 60-61 (recognizing that conflicting approaches to class actions issues relating to duplicate recovery and forum-shopping).

\(^{77}\) See Kahn, supra note 74, at 413 (raising concerns of multiple recoveries against the same defendant in different jurisdictions); see also Buxbaum supra note 13, at
It has been suggested that to remain competitive, the United States' financial regulatory regime ought to be more cohesive and predictable. The US system need not be perfect, but it should balance domestic policy concerns against some sense of integration with international regulatory schemes. Until globally applicable regulations are in place, the United States must be able to coordinate with other jurisdictions and trust in the regulatory choices made elsewhere.

There do not appear to be gaps in international enforcement should the United States decline to extend § 10(b) beyond its borders. In addition to the United Kingdom, Switzerland and Germany have also enacted robust and sophisticated prohibitions against securities fraud, and have been committed to enforcing their laws. The European Union has also issued directives pertaining to securities regulation, while still leaving room for individual Member States to devise their

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78. See New York Report, supra note 50, at 78 ("[T]he US system’s complexity, cost, and perceived lack of responsiveness, if left unchanged, are likely to make the United States less attractive going forward."); see also Choi & Guzman, supra note 2, at 208 (stating that “American capital markets are served best through clear jurisdictional rules that . . . provide unambiguous means for [parties] to opt-out of the domestic regulatory system”).

79. See Kahn, supra note 75, at 418 (discussing the need for American securities regulations to take a balanced approach to enforcement and allow for international cooperation); see also Buxbaum, supra note 13, at 64 (cautioning against extending the reach of US securities law in the absence of the full participation of other jurisdictions).

80. See Kahn, supra note 74, at 418; see also European Associations Amicus Brief, supra note 71, at 21 (“Because clarity and cooperation are the lifeblood of deterrence, muddying the waters through extraterritorial application of U.S. law will further hinder the common objective of preventing securities fraud.”).

81. See European Associations Amicus Brief, supra note 71, at 17 (arguing that the Morrison case could have been brought in Australia, under Australian law); see also Kahn, supra note 75, at 409 (“[A] federal court in the United States certainly would not be the only arbiter with jurisdiction over claims arising out of that transaction, and may not be the most appropriate one either.”).

82. See, e.g., Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBl. I at 1592 (Ger.); LOI SUR LA SURVEILLANCE DES MARCHÉS FINANCIERS [LFINMA] [FINANCIAL MARKET SUPERVISION ACT] Jan. 1, 2009, SR 956.1, art. 5 (Switz.); Financial Services and Markets Act, 2000, c. 8, § 90 (U.K.); see also European Associations Amicus Brief, supra note 72, at 21-26 (explaining the Swiss and German regulatory regimes); UK Amicus Brief, supra note 59, at 5-8 (explaining the securities regulations of the United Kingdom).
own policies. Moreover, any additional risks imposed by differing regulations inform the prices of securities traded in those markets.

Switzerland enacted the Swiss Financial Market Supervision Act, unifying the several laws governing their financial market, and created a new regulatory agency to oversee investor protection mechanisms. Swiss laws impose an ongoing duty for issuers to disclose potentially price-sensitive facts as they arise, and hold officers and directors criminally responsible for false or incomplete disclosures. Should misrepresentations be made in connection with an initial public offering, the plaintiff only needs to prove that the defendant was negligent. Private civil claims


84. See Choi & Guzman, supra note 2, at 220–21 (stating that the regulatory structure in place would affect how investors price securities); see also Buxbaum, supra note 13, at 68 (stating that the price of a security would reflect the regulatory scheme governing that security).


87. See Code des obligations [CO] [Code of Obligations], Mar. 30, 1911, SR 220, art. 752 (Switz.) (establishing negligence as the minimum standard of culpability for misleading information in a prospectus).
for damages resulting from misrepresentation are also permitted. 88

Germany has also enacted its own comprehensive legislation, the Securities Trading Act. 89 This legislation covers insider trading, market manipulation, and the dissemination of false information affecting the value of securities. 90 Germany, although cooperative with the SEC in the past, has also previously expressed its objection to US civil suits that encroach on its "sovereign prerogative" to respond to securities fraud occurring within its borders. 91 Germany expressly grants exclusive venue to the issuer's home state in securities fraud cases, therefore blocking the enforcement of judgments or settlements adjudicated in America against German issuers. 92

Commentators have suggested that if the United States does not tread carefully, other nations will engage in policies similar to Germany's, undermining efforts to create a stable international securities market. 93 Governments and economic agencies alike have overwhelmingly voiced their concerns about extraterritoriality, as evidenced by the number of amicus briefs

88. See id. art. 41, § 2 (permitting compensatory payments in private actions for damages).
89. See generally Wertpapierhandelsgesetz [WpHG][Securities Trading Act], Sept. 9, 1998, BGBl. I at 1592 (Ger.).
90. See id. §§ 14, 20a, 37b, 37c.
91. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996-97 (2d Cir. 1975), (stating that the record contains affidavits from the German government explaining their refusal to honor any judgments made against the defendant issuer as a bar for their citizens' own claims for securities fraud; the English, French, Italian, and Swiss governments submitted similar affidavits) abrogated by Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010); see also European Associations Amicus Brief, supra note 72, at 26. The SEC has bilateral memoranda of understanding on information sharing and enforcement cooperation with its counterpart agencies in more than twenty different countries. See Brief of the United States as Amicus Curiae Supporting Respondents at 26, n.4, Morrison', 130 S. Ct. 2869 (No. 08-1191) [hereinafter SEC Amicus Brief].
92. See ZIVILPROZESSORDNUNG [ZPO][CODE OF CIVIL PROCEDURE], Sept. 12, 1950, BUNDESGESETZBLATT [BGBl. 1] S1781, as amended, § 32b (Ger.) (restricting venue to the home state of the issuer in a securities fraud action); see also European Associations Amicus Brief, supra note 72, at 26 (commenting upon Germany's restrictions on venue for securities cases).
93. See Sharon E. Foster, While America Slept: The Harmonization of Competition Laws Based Upon the European Union Model, 15 EMORY INT'L L. REV. 467, 486 (2001) (arguing, in the context of antitrust law, that unilaterally extending the extraterritorial reach of US law could lead to increased resistance elsewhere); see also White, supra note 4, at 115-16 (suggesting that non-US courts may retaliate by extending jurisdiction over predominantly American cases).
filed when Morrison was argued in the Supreme Court.\footnote{See, e.g., UK Amicus Brief, supra note 59; European Associations Amicus Brief, supra note 72; European Companies Amicus Brief, supra note 83; see also U.S. Supreme Court Greatly Restricts Extraterritorial Application of Civil Securities Fraud Actions Skadden, Arps, Slate, Meagher & Flom LLP (July 19, 2010), http://www.skadden.com/content/Publications/Publications2112_0.pdf [hereinafter Skadden Memo] (recognizing the implications of amicus briefs filed by Australia, France, and the United Kingdom).} Morrison is also not the first US securities class action case to hear objections from other countries.\footnote{See Bersch, 519 F.2d at 996-97 (stating that England, Germany, Italy, and Switzerland filed affidavits to the court hearing a § 10(b) claim).}

C. The Presumption against Extraterritoriality in American Law

"United States law governs domestically but does not rule the world."\footnote{Microsoft Co. v. AT&T Co., 550 U.S. 437, 454-55 (2007) (discussing the extraterritorial reach of US patent law).} Congress may choose to enforce its laws beyond the territorial boundaries of the United States should it so intend; however, it has long been recognized that absent Congress' express intent as shown in the face of the statute, federal law has no extraterritorial reach.\footnote{Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co. ("Aramco"), 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949))).} Since 1804, US courts have recognized that, where possible, a statute should be construed as not to violate international law.\footnote{Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains ....").} This principle is all the more relevant in today's "highly interdependent commercial world."\footnote{John H. Knox, A Presumption Against Extrajurisdictional, 104 Am. J. Int'l L. 351, 386 (2010) (citing cases where the US Supreme Court urged caution in potentially interfering with international policy decisions that should be left to political decision makers).} Moreover, the US Supreme Court has been careful in choosing to step away from "sensitive questions of international relations."\footnote{F. Holfman-La Roche Ltd. v. Empagran S.A. ("Empagran"), 542 U.S. 155, 165 (2004) (ruling on the extraterritorial reach of US antitrust law); see also Susan E. Burnett, U.S. Judicial Imperialism Post Empagran v. F. Hoffman-LaRoche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust, 18 EMORY INT'L L. REV. 555, 693 (2004) (recognizing, in the context of antitrust regulation, that there is a demand for cooperation across international agencies due to the increasingly interdependent nature of markets).} Such issues are deemed to be best left to political
branches, which are probably better versed in the realm of international relations and policy.\textsuperscript{101} This stance also has some pecuniary benefits, considering US courts have limited resources.\textsuperscript{102} The idea is that American courts should not be expending their limited resources on cases involving hardly any domestic conduct, let alone cases that do not affect Americans.\textsuperscript{103}

Before Morrison, the presumption against extraterritoriality had been upheld in anti-discrimination and antitrust law.\textsuperscript{104} The presumption has also been upheld in instances where the plaintiff is American.\textsuperscript{105} In 2004, the US Supreme Court decided \textit{F. Hoffman-LaRoche Ltd. v. Empagran S.A.}, which involved a class of international consumers alleging that non-US manufacturers and distributors had engaged in price-fixing.\textsuperscript{106} The relevant goods were delivered outside the United States.\textsuperscript{107} The US Supreme Court declined to extend antitrust regulations involving "foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiffs' claim."\textsuperscript{108} Moreover, the Court announced that it

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\textsuperscript{101} See Knox, supra note 100, at 386 (stating that the US Supreme Court has previously deferred to political branches when faced cases that involve international affairs); see also Curtis A. Bradley, \textit{The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law}, 86 Geo. L. J. 479, 525 (1998) (stating that the US Constitution assigns power relating to international affairs to the political branches and the head of state).

\textsuperscript{102} See Kahn, supra note 75, at 409-10 (stating that the resources of US courts are not unlimited and may be better spent on cases that have more than a tangential connection to the United States); see also White, supra note 4, at 86 (noting that US law enforcement resources are relevant in discussing extraterritoriality).


\textsuperscript{104} See Aramco, 499 U.S. at 247, 259 (holding that Title VII of the US Civil Rights Act does not apply to American citizens employed abroad by American employers after an American citizen hired by a subsidiary of "Aramco" was discharged, allegedly because of his race, religion, and national origin).

\textsuperscript{105} Empagran, 542 U.S. at 159.

\textsuperscript{106} Id. at 159-60.

\textsuperscript{108} Id. at 165 (emphasis omitted). The Court elaborated, asking, "[w]hy should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers . . . ?" Id. at 166.
“ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”

This is consistent with the United States’ longstanding views on extraterritoriality, which are reflected in Sections 402 and 403 of the Restatement (Third) of Foreign Relations Law (“Restatement”). It is generally permissible for a state to prescribe law with respect to: “(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory.” At the same time, Section 403 draws limits on such bases. Exercise of jurisdiction over a person or activity with “connections to another state” is improper where it is unreasonable. The following factors, among others, are listed as relevant to this determination: “character of the activity to be regulated . . . and the degree to which the desirability of such regulation is generally accepted[,] . . . the extent to which another state may have an interest in regulating the activity[,] and the likelihood of conflict with regulation by another state.” Section 403 goes on to state that if another state’s interest is “clearly greater,” then that state should be given deference.

The degree of deference owed to the laws of other nations underpins the conflicting tests for extraterritoriality in Morrison and Dodd-Frank. Beyond the substantive securities regulations of other nations, however, consideration must also be given to broader themes pertaining to economic policy, procedural rules

109. Id. at 164. Commentators have suggested that § 10(b) is one such ambiguous statute. Section 10(b) derives its legitimacy from the commerce clause, and forbids the use of “interstate commerce” in effectuating any fraud or deceit. “Interstate commerce” may include trade or dealing with other nations. See Choi & Guzman, supra note 2, at 215 (stating that the reach of the Exchange Act is ambiguous); see also Testy, supra note 10, at 932 (stating that “interstate commerce” is broadly defined).

110. See Restatement (Third) of Foreign Rel. Law § 402, 403.

111. Restatement (Third) of Foreign Rel. Law § 402 (listing the bases by which jurisdiction over non-US subjects is proper).

112. Id. § 403 (listing circumstances wherein jurisdiction over non-US subjects would be improper).

113. Id.

114. Id.

115. Id.
accompanying those regulations, and the spirit of that state's civil litigation system.

II. COMPETING STANDARDS FOR EXTRATERRITORIALITY

The transactional test established in Morrison seems to pull the fulcrum closer to deferring to other jurisdictions better suited for the claim at hand. Meanwhile, the conduct-and-effect test proposed in Dodd-Frank makes non-US defendants defer to US law. This Part discusses the competing standards for evaluating the extraterritoriality of § 10(b) in Dodd-Frank and in Morrison. Section A discusses the evolution of the conduct and effects test that the US Congress is considering extending to private rights of action in f-cubed litigation, while Section B examines the Morrison transactional test, including responses from judges and litigants since its creation.

A. The Conduct Test and the Effects Test

Dodd-Frank combines the tests that existed in American jurisprudence prior to Morrison. Both the conduct test and the effects test originated in the US Court of Appeals for the Second Circuit.116 These tests were established to determine whether or not the US district courts had subject-matter jurisdiction, or whether Congress "would have wished the precious resources of the United States courts and law enforcement" to be spent on a predominantly non-US transaction, instead of leaving the problem to other jurisdictions.117

Section 10(b) had previously been found to apply where it was "necessary to protect American investors."118 In Schoenbaum v. Firstbrook, the Second Circuit eschewed prior consistent application of the presumption against extraterritoriality, when it held that § 10(b) applied where a transaction that occurred outside the United States affected the value of common shares


118. Schoenbaum, 405 F.2d at 206.
publicly traded in the United States. Jurisdiction was deemed proper, and the presumption against extraterritoriality was rebutted where non-US conduct had an impact on US investors and markets. Some courts have further developed this test by requiring specific effects, or substantial effects, in the United States. As a general matter, allegations of non-US conduct only generally affecting the US market have failed the effects test. There has not been much difficulty or inconsistency in the application of this test.

Section 10(b) had also been extended to cases where some of the deceptive conduct occurred in the United States. In Leasco Data Processing Equipment Corp. v. Maxwell, the Second Circuit applied § 10(b) where there was significant conduct that took place in the United States that brought the defendant within the purview of US district courts. The conduct test had since been refined, and courts looked for substantial acts surrounding the fraudulent activities that occurred in the United States. Under the conduct test, such acts must not be “merely preparatory” to the fraud. Some US courts have also singled out causation as a

119. Id. at 208-09 (“This impairment of the value in American investments by sales by the issuer in a foreign country . . . has in our view, a sufficiently serious effect upon United States commerce to warrant assertion of jurisdiction for the protection of American investors . . . .”).
120. See id.
121. See, e.g., Bersch, 519 F.2d at 989 (requiring that the injury sustained must have been from transactions involving purchasers or sellers of securities “in whom the United States has an interest”); In re Royal Ahold N.V. Sec. & ERISA Litig., 351 F. Supp. 2d 334, 360 (D. Md. 2004) (requiring that the injury be directly sustained by “specific American investors”).
122. See, e.g., Bersch, 519 F.2d at 989 (requiring more than general effects on the American economy to establish jurisdiction); In re Royal Ahold, 351 F. Supp. 2d at 363 (describing the allegations in the case as too “generalized” for the court to have jurisdiction).
123. See Kahn, supra note 75, at 375 (acknowledging the straightforward application of the effects test); see also Buxbaum, supra note 13, at 42-43 (explaining general principles that facilitate the application of the effects test).
125. See, e.g., IIT, an Int’l Inv. Trust v. Vencap, Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975), (stating that the mere occurrence of an act in the United States is not sufficient for US courts to extend jurisdiction where most of the fraud occurred abroad) abrogated by Morrison, 130 S. Ct. 2869.
126. See, e.g., Itoha Ltd. v. Lep Grp. PLC, 54 F.3d 118, 122 (2d Cir. 1995), abrogated by Morrison, 130 S. Ct. 2869; Bersch, 519 F.2d at 987. Actions that are not “merely preparatory” may involve the creation of false financial information, transmission of false financial information overseas, and approval of such false statements prior to
critical factor, requiring plaintiffs to show that these acts directly caused their loss.127

While the conduct test seems straightforward, courts have faced difficulties with its application.128 The test has been criticized as being inconsistently applied and highly susceptible to manipulation.129 In following the Second Circuit’s lead, the various circuit courts have issued varying interpretations of the test.130 For example, some courts have looked for additional “tipping factors” beyond the conduct test to establish jurisdiction over a predominantly international case.131 Extraterritorial jurisdiction could be determined entirely by how clever litigants are in identifying and presenting “relevant” conduct that occurred in the United States.132

The Second Circuit has previously suggested that combining the two tests would help in examining the connection of the alleged wrongful conduct to the United States.133 It is unclear,
however, if requiring both proof of relevant conduct and significant effects is indicative of expanding or contracting the reach of § 10(b).\textsuperscript{134} Requiring both conduct and effects imposes an additional burden of proof upon a plaintiff who previously only had to meet one or the other, thereby creating an additional roadblock to suing under § 10(b).\textsuperscript{135} Conversely, a more holistic approach that considers both conduct and effects, where neither test would sufficiently trigger jurisdiction, gives judges more leeway in approaching different factual scenarios.\textsuperscript{136}

B. The Transactional Test

1. The \textit{Morrison} Case

\textit{Morrison} makes it so that courts are not to look for some wrongful conduct that could tie non-US issuers to the United States.\textsuperscript{137} Instead, \textit{Morrison} imposes a transactional test that resolves the split detailed above.\textsuperscript{138} In June of 2010, the US Supreme Court eliminated the private right of action implied in § 10(b) where the traded security was not listed on an American stock exchange, or where the purchase or sale of the security did not occur in the United States.\textsuperscript{139} This standard, created in order to provide stability and predictability to securities litigation,
presents a question of substantive law, rather than subject-matter jurisdiction.140  

In Morrison, non-US investors who purchased shares in what was then the largest bank in Australia, pursued a civil action in the Southern District of New York under § 10(b).141 The bank's ordinary shares, or common stock, were not traded on any exchange in the United States; however, its American Depositary Receipts were listed on the New York Stock Exchange (“NYSE”).142 The investors alleged that the bank’s financial statements were false and misleading because one of its American subsidiaries had mistated the value of its future income from mortgage service fees.143 According to the complaint, the bank had manipulated its financial models to reflect “unrealistically low” rates of early loan repayment, thus inflating the value of their mortgage-servicing rights.144  

At the district court level, the bank moved to dismiss on two grounds: first, for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure; and second, for failure to state a claim under Rule 12(b)(6).145 The district court granted the Rule 12(b)(1) motion because the acts in the United States were “at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad.”146 Similarly, the Second Circuit found that acts performed in the United States did not “comprise the heart of the alleged fraud.”147 The US Supreme Court, however, dismissed

140. See id. at 2877–81 (quoting Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment, 130 S. Ct. 584, 589 (2009) (internal quotation marks omitted)) (“[T]o ask what conduct § 10(b) reaches is to ask what § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, ‘refers to a tribunal’s power to hear a case.’”).  
141. Id. at 2875. Robert Morrison, an American, was initially involved, but was dismissed for failure to show damages at the district court level. Id. at 2876 n.1.  
142. Id. at 2875. An American Depositary Receipt (“ADR”) is a traded instrument that facilitates international investing. Each ADR represents shares of non-US stock, or a fraction of a share. Ownership of an ADR gives the holder the right to obtain the shares it represents. See id.; see also American Depositary Receipts, U.S. SEC. & EXCH. COMM’N, http://www.sec.gov/answers/adrs.htm (last visited Apr. 8, 2011)  
143. Morrison, 130 S. Ct. at 2876.  
144. Id.  
145. Id.  
the suit because the transaction occurred in Australia.\textsuperscript{148} In

dismissing the lawsuit, the US Supreme Court also changed the
extraterritoriality jurisprudence for the future.\textsuperscript{149}

2. The Position of the SEC

The SEC, although ultimately submitting an amicus brief in
support of the Australian bank, expressed its support for a
modified version of the conduct-and-effects test.\textsuperscript{150} It is the
position of the US government that a more restrictive standard
for non-US § 10(b) claims could put the United States at risk of
becoming "a base for orchestrating securities frauds for export."\textsuperscript{151} Therefore, according to the SEC, the appropriate
standard would be one that considers the "significant and
material conduct" involved in the transaction.\textsuperscript{152} If the fraudulent
activity involves significant conduct material to the fraud’s
success, and that conduct occurred in the United States, then §
10(b) has been violated.\textsuperscript{153} Such conduct would include: making
misrepresentations in the United States, instances where the
deceit is "masterminded" in the United States, or instances
where the transaction takes place on US markets.\textsuperscript{154} The
underlying theory being advanced by the SEC is that § 10(b)
exists to create a "high standard of business ethics in the
securities industry."\textsuperscript{155} This also serves to protect US investors
against fraud as non-US issuers could potentially direct their
fraudulent activity toward American investors.\textsuperscript{156}

The SEC in its amicus brief also favored a greater emphasis
on causation, as it sought to draw focus away from an approach
that looks at "the 'heart' of the fraud."\textsuperscript{157} It suggested an
additional requirement that private plaintiffs demonstrate that
direct injury resulted from a component of the fraud that

\textsuperscript{148} Morrison, 130 S. Ct. at 2888.
\textsuperscript{149} Id.
\textsuperscript{150} See SEC Amicus Brief, \textit{supra} note 91, at 17–18.
\textsuperscript{151} Id. at 6.
\textsuperscript{152} Id. The SEC also pointed out that this is the standard that the SEC uses in
administrative adjudications, and should thus be entitled deference. \textit{Id.} at 6, 18.
\textsuperscript{153} Id. at 6, 16.
\textsuperscript{154} Id. at 16. (citing examples of prior cases).
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 17.
\textsuperscript{157} Id. at 19, 25.
occurred in the United States. While this requirement imposes an additional burden on the plaintiff, it may also lower the cost of international commerce; specifically, the cost of doing business in the United States.

3. Responses to *Morrison*

As discussed in Part I.B., international bodies have expressed their objections to the extraterritoriality of US securities laws. These objections stem from emphasizing the importance of international comity, particularly given the variety of securities regulations available across major players in the global securities market.

The transactional test proposed in *Morrison*, basing the application of § 10(b) on the location of the transaction, however, is not without criticism. In his concurrence, Associate Justice John Paul Stevens expressed his concern that this “novel rule” effectively “pays short shrift to the United States’ interest in remedying frauds that . . . harm American citizens . . . .” Beyond the public policy issue, district courts have opined that *Morrison* could have better defined the test’s terms. For example, *Morrison* failed to completely discuss what it meant for a purchase or sale to have been “made in the United States.”

Since *Morrison* was handed down, there has been significant scrambling to modify pleadings and motions in outstanding class action suits that were directly affected by the Court’s holding. Class actions have been trimmed in size, as investors who purchased shares abroad were removed from the class, thereby

158. *Id.* at 26.
159. *See id.* at 27 n.5.
160. *See supra* Part I.B. for objections expressed by international bodies regarding US securities laws and examples of other jurisdictions’ regulatory schemes.
161. *See supra* Part I.B. for examples of other jurisdictions’ regulatory schemes.
reducing the millions of dollars in damages at stake.\textsuperscript{165} \textit{Morrison} also negatively affects the securities class action bar, which had been expanding overseas and offering services to non-US investors and encouraging them to file suit in the United States.\textsuperscript{166}

Both plaintiffs' and defendants' attorneys have taken \textit{Morrison} as an exercise in creative interpretation.\textsuperscript{167} Plaintiffs, however, have been unsuccessful at the district court level in trying to sidestep \textit{Morrison}.\textsuperscript{168} American purchasers of non-US shares have sought to limit \textit{Morrison} to its facts.\textsuperscript{169} \textit{Cornwell v. Credit Suisse Group} and \textit{In re Société Générale Securities Litigation} attempted to draw the court's attention to pre-sale conduct in the United States to justify the application of § 10(b), but were unsuccessful.\textsuperscript{170} In \textit{In re Banco Santander Securities-Optimal Litigation}, the plaintiffs argued that the investor had merely purchased international securities in order to invest with an American investment firm, but the court was not persuaded.\textsuperscript{171} Plaintiffs have also attempted to characterize their transactions as domestic rather than international where a company's shares are listed both on the NYSE and elsewhere, or by challenging the definition of what it means for a share to be “listed.”\textsuperscript{172} These

\begin{itemize}
  \item 165. \textit{See} Koppel & Jones, \textit{supra} note 65 (reporting the effects of the \textit{Morrison} holding on foreign-cubed securities class action suits); see also Tim Sharp, \textit{RBS Relief after Class Action Case Dismissed by Judge}, HERALD SCOTLAND, Jan. 13, 2011, at 30 (reporting the effects of the \textit{Morrison} holding on a class action case against a Scottish bank).
  \item 166. \textit{See} Koppel & Jones, \textit{supra} note 65 (“[The Morrison ruling] marks another blow to the securities class-action bar, which in recent years has encouraged foreign investors to file U.S. suits . . . .”); see also Buxbaum, \textit{supra} note 13, at 62 (explaining the US securities class action bar's efforts to involve non-US claimants in US securities class actions).
  \item 167. \textit{See} Skadden Memo, \textit{supra} note 94, at 3. (“We have already seen plaintiffs taking creative positions in an attempt to avoid the impact of \textit{Morrison} . . . .”). \textit{See generally} Koppel & Jones, \textit{supra} note 65 (providing examples of how parties with pending cases are responding to \textit{Morrison}).
  \item 168. \textit{See} \textit{supra} note 164 for examples of cases adversely affected by \textit{Morrison}.
  \item 170. \textit{See} Cornwell \textit{v. Credit Suisse Grp.}, No. 08 Civ. 3758 (VM), 2010 U.S. Dist. LEXIS 76543 at *4–6 (S.D.N.Y. July 26, 2010); \textit{In re Société Générale}, 2010 U.S. Dist. LEXIS 107719, at *18 (“By asking the Court to look to the location of 'the act of placing a buy order,' . . . . Plaintiffs are asking the Court to apply the conduct test specifically rejected in \textit{Morrison}.”).
\end{itemize}
too, were unsuccessful.\footnote{173} Parties have also invoked analogies from traditional principles of contract law to illustrate loopholes in \textit{Morrison}.\footnote{174} One plaintiff argued that the execution of a purchase agreement ought to determine whether or not the transaction occurred abroad.\footnote{175} However, another court held that even when a purchase order might electronically pass through a US server, that is not enough to overcome \textit{Morrison}.\footnote{176}

Courts have generally responded by drawing attention to Justice Antonin Scalia’s colorful language in recognizing that some US activity may find its way into a predominantly international transaction, but that does not mean that every case is therefore domestic.\footnote{177} In their decisions, courts have also sought to impress upon litigants the importance of international comity: they decide in a manner that does not contradict international law.\footnote{178} Until the SEC completes its study, for private causes of action under § 10(b), the “conduct and effect doctrine took a great fall. And neither Plaintiffs law horses, nor [a] Court’s pen can put the pieces together again.”\footnote{179}

\begin{itemize}
\item \footnote{173} \textit{Id.} at 472.
\item \footnote{174} See Motion to Dismiss at 12–13, Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., No. 10-4537 (S.D.N.Y. filed Sept. 1, 2010) [hereinafter BYAF Motion to Dismiss] (citing case law and authorities on American contract law supporting the proposition that the place of contracting is where the acceptance is spoken); see also \textit{In re Société Générale}, 2010 U.S. Dist. Lexis 107719 at *16 (“[I]t may be . . . appropriate . . . to look to the common law’ to determine the locus of securities transactions.” (quoting Plaintiffs’ Sur-Reply at 7–8 \textit{In re Société Générale}, 2010 U.S. Dist. LEXIS 107719)).
\item \footnote{175} See \textit{BYAF Motion to Dismiss}, supra note 174, at 10. As a matter of common law, the place of contracting is where the “final act binding the parties” occurred. \textit{See id.} at 11.
\item \footnote{177} \textit{See, e.g., In re Alstom}, 741 F. Supp. 2d at 472 (calling attention to Justice Scalia’s observations that, “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States”’ and that “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case”’ (quoting \textit{Morrison v. Nat’l Austl. Bank Ltd.}, 130 S. Ct. 2869, 2884 (2010))).
\item \footnote{178} \textit{See, e.g., Plumbers Union}, 2010 U.S. Dist. LEXIS 105720, at *22 (recognizing that “avoiding “interference with foreign securities regulation” is of paramount concern” (quoting \textit{Morrison}, 130 S. Ct. at 2886)).
\item \footnote{179} \textit{Cornwell v. Credit Suisse Grp.}, No. 08 Civ. 3758 (VM), 2010 U.S. Dist. LEXIS 76543 at *21–22 (S.D.N.Y. July 26, 2010).
\end{itemize}
III. A CASE FOR UPHOLDING MORRISON

Ultimately, the conflict is that *Morrison* limits the reach of § 10(b) to transactions that occur in the United States, whereas Dodd-Frank’s conduct-and-effects test opens the door to the US district court for plaintiffs suing non-US issuers.\(^\text{180}\) Dodd-Frank asks the SEC to consider the possibility of limiting the private right of action, how such an action affects international comity, the economic costs and benefits of a broad private right of action, and whether the extraterritoriality standard should be narrower than what it prescribes for actions brought forth by the SEC.\(^\text{181}\) This Part explains why limiting the private right of action is questionable, that a sweeping private right of action conflicts with international laws and thus runs counter to international comity, and that the economic costs would outweigh the benefits of such a right of action. Therefore, a narrow extraterritorial standard, such as the test in *Morrison*, should apply.

A. International Comity Calls for Boundaries

International comity and US precedent are adverse to extraterritoriality.\(^\text{182}\) As such, *Morrison* was correctly decided, and should not be abrogated in the near future.\(^\text{183}\) To extend § 10(b) to private causes of action advanced by plaintiffs who purchased shares of a non-US issuer on an international stock exchange would be an impermissible stretch of American authority beyond the reach of the US Congress and the SEC. First, it is an unreasonable exercise of jurisdiction pursuant to Section 403 of the Restatement (Third) of Foreign Relations Law.\(^\text{184}\) Section 402 of the Restatement does permit a state to prescribe law where international conduct has substantial effects within that state’s

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180. See supra notes 3, 8 and accompanying text (providing the holding of *Morrison* and the relevant provision of the Dodd-Frank Act).
181. See supra note 36 and accompanying text (providing the statutory language of Dodd-Frank regarding the SEC study).
182. See supra notes 79–80, and accompanying text (explaining the need for international cooperation in securities regulation and the presumption against extraterritoriality in American law).
183. See supra note 139 and accompanying text (providing the holding of *Morrison*).
184. See supra notes 112–15 and accompanying text (explaining circumstances that would make US jurisdiction improper).
territories. Unfortunately, while certain members of Congress have called for the reversal of *Morrison*, there have not been any clear indications as to what standards they would prefer in cases involving private litigants. As such, there is an additional layer of complexity for the issuer and the judge. This ambiguity creates speculation on the part of the issuer in trying to comply with the law. Moreover, as one judge or jury’s “substantial” may be another’s “insignificant,” cases will once again be handled inconsistently. The conduct test itself has proven problematic in the past; to complicate the effects prong seems unduly burdensome. Furthermore, these ambiguities create additional problems related to comity. Jurisdictions might differ on what “substantial” is, which is highly likely, considering jurisdictions already differ on what “material” means in the context of material versus immaterial disclosures as required by statute.

Such an exercise of jurisdiction is unreasonable because although regulation of financial markets is desirable, this does not mean that the United States holds, or ought to hold, a monopoly on regulatory capabilities. Section 403 of the Restatement lists the “likelihood of conflict with regulation by another state,” as well as the other state’s interests, as factors in determining the reasonableness of jurisdiction. As discussed above, other jurisdictions have equally sophisticated, if not more

185. *See supra* note 111 and accompanying text (explaining when the exercise of US jurisdiction is permitted).
186. *See supra* notes 34–36 and accompanying text (referring to Congress’ intent regarding *Morrison*).
187. *See supra* note 128 and accompanying text (referring to the difficulty judges have had in applying the conduct test).
188. *See supra* note 78 and accompanying text (stating that there is a need for greater clarity in US securities regulations).
189. *See supra* note 129 and accompanying text (referring to the inconsistent treatment of foreign-cubed class actions in the past).
190. *See supra* note 128 and accompanying text (referring to the inconsistent application of the conduct test).
191. *See supra* note 61 and accompanying text (referring to the relevance of international comity).
192. *See supra* note 72 (providing examples of how jurisdictions differ in their securities regulations).
193. *See supra* note 10 and accompanying text (referring to the concerns of other jurisdictions regarding the reach of US securities law).
refined, regulatory schemes. The availability of various other regulatory schemes would limit the level of regulatory arbitrage that issues can exploit. Switzerland and Germany, for example, appear to offer investors at least the same protections available in the United States. Although regulations may differ in stringency, the degree of stringency in a jurisdiction's laws is a result of conscious decisions made by that jurisdiction's authorities. To interfere with those decisions is paternalistic, possibly offensive, and does little to promote a more unified global regulatory regime.

Merely ceding the floor to other regulatory regimes for private causes of action does not render § 10(b) ineffective. \footnote{195. See supra notes 85–90 and accompanying text (explaining the securities regulations of other jurisdictions).} \footnote{196. See supra notes 85–90 and accompanying text (explaining the securities regulations of other jurisdictions).} \footnote{197. See supra notes 85–90, 92 and accompanying text (explaining Switzerland and Germany's securities regulations).} \footnote{198. See supra notes 82–83 and accompanying text (describing other jurisdictions' efforts to prohibit securities fraud).} \footnote{199. See supra note 10 and accompanying text (referring to the reaction of international capitals to Dodd-Frank).} \footnote{200. See supra notes 23–24 and accompanying text (discussing the enforcement powers of the SEC).} \footnote{201. See supra notes 3, 8 and accompanying text (explaining how the SEC retains enforcement powers, including over American companies and non-US issuers who list shares in the US).} \footnote{202. See supra note 30 and accompanying text (clarifying the role of the US government in securities fraud regulations).} \footnote{203. See supra note 153 and accompanying text (explaining the SEC's concerns regarding this issue).} Morrison does not preclude action against American companies, and Dodd-Frank allows the SEC to pursue actions against non-US issuers. Having two separate tests to determine extraterritoriality provides opportunities for the US government to protect its citizens without unduly imposing additional burdens upon non-US issuers. Dodd-Frank's conduct-and-effects test adequately alleviates the concerns the SEC expressed in its amicus brief for Morrison, where it drew attention to the need for investor protection and preventing the United States from becoming a locale for international securities fraud.
B. Redress for American Investors

Having a separate test for actions instituted by the SEC responds to Justice Stevens' concerns over Americans choosing to purchase non-US shares on an international exchange.\textsuperscript{204} Affected Americans wishing to file private suits will have to do so elsewhere because of \textit{Morrison}.\textsuperscript{205} Still, they can rely on the SEC to commence suits in the United States against non-US issuers who have engaged in fraudulent conduct and caused detrimental effects in the United States.\textsuperscript{206} At the very least, increasing the importance of the SEC's role in such transactions may pressure them to do their job well, as investors may be unable to pursue "justice" on their own. Nevertheless, American investors may have to accept that American law will not always protect them when they choose to engage in securities transactions outside US borders.\textsuperscript{207} Such is a cost of doing business abroad.\textsuperscript{208} Basic due diligence will inform the rational investor that the particular security he or she is purchasing is priced to include information pertaining to the legal system governing that stock.\textsuperscript{209} Moreover, purchasing shares abroad, and thereby supporting other economies, can be construed as impliedly giving up the right to sue in the United States.\textsuperscript{210}

If the ability to litigate in US courts is important to the investor, then he or she should consider purchasing shares listed on US stock exchanges rather than those listed abroad.\textsuperscript{211} Still, should something untoward happen in the future, the SEC does

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\item \textsuperscript{204} See supra note 162 and accompanying text (referring to Justice Stevens' opinion).
\item \textsuperscript{205} See supra note 139 and accompanying text.
\item \textsuperscript{206} See supra note 30 and accompanying text (clarifying the role of the SEC in multinational securities fraud actions).
\item \textsuperscript{207} See supra note 139 and accompanying text (explaining the Supreme Court's holding in \textit{Morrison}, which represents an example where American investors who invested abroad, were not protected by US law).
\item \textsuperscript{208} See supra note 84 and accompanying text (referring to the costs of participating in worldwide commerce).
\item \textsuperscript{209} See supra note 84 and accompanying text (stating that the price of the security reflects all available information, including the regulatory scheme governing the security).
\item \textsuperscript{210} See supra note 84 and accompanying text (referring to the costs of participating in worldwide commerce).
\item \textsuperscript{211} See supra note 83 and accompanying text.
\end{itemize}
have the authority to intervene on the investor's behalf. To also permit the investor to sue individually, or with others similarly situated as a class, gives the investor at least two opportunities to recover from the defendant: one with the SEC, which redistributes any collected monies to injured investors, and another in private litigation. A third action might be possible, or even necessary, if the issuer is in a jurisdiction that does not recognize US judgments. Having multiple causes of action for the same conduct in different jurisdictions is simply inefficient for plaintiffs, and causes the defendant issuer to expend more resources in response. Regardless of whether the defendant settles out of court or staunchly defends itself, multiple actions detract the issuer from rehabilitating its share price by improving its operations or engaging in activities that would promote growth and development. Considering the weakened state of the US economy, issuers should not need to worry about being sued in multiple courtrooms, each time under different legal standards, when their efforts could be better placed in stimulating business and economic growth.

C. Legal Costs of Doing Business in the United States

The transactional test makes economic sense: it could level the legal costs of doing business in the United States and make the US financial market more competitive. The implications of the transactional test upon the US economy are yet to be seen. Nonetheless, facilitating international trade and cooperation, as well as attracting investment in US financial markets should be a

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212. See supra notes 22–24 and accompanying text (referring to the SEC's enforcement powers).
213. See supra note 24 and accompanying text (discussing the results of SEC enforcement actions).
214. See supra note 92 and accompanying text (recognizing Germany as a jurisdiction that refuses to recognize US judgments).
215. See supra note 48 and accompanying text (referring to the resources required to defend a securities fraud claim).
216. See supra note 49 and accompanying text (referring to the potential problems raised by shareholder litigation).
217. See supra notes 49, 57 and accompanying text (referring to the need to stabilize securities markets and how shareholder litigation may have opposite effect).
218. See supra note 57 and accompanying text (referring to the unpredictability of the US legal system and how it can cost the US market).
219. See supra note 163 and accompanying text (referring to most recent case decided under Morrison at time of this writing).
priority for the US government.\textsuperscript{220} Having a regulatory system that is more predictable, or at least one that permits issuers to carry out its plans with a minimum risk of being surprised by the US common law system, is a step towards that direction.\textsuperscript{221} For example, Chinese enterprises with substantial resources might prefer to list their shares elsewhere, such as Switzerland, rather than the NYSE, if doing so limits their exposure to a ravenous plaintiff's bar.\textsuperscript{222} Alternatively, the hypothetical issuer might be looking for a jurisdiction that provides, with greater clarity, the standards of behavior to which it must adhere; a jurisdiction that will not suddenly impose additional obligations via the class action mechanism.\textsuperscript{223} It is advantageous for the United States to not increase the legal cost of doing business within its borders. However, the conduct-and-effects test will make multinationals think twice about setting up operations in the United States, potentially taking talent away from the US job market as well.\textsuperscript{224}

When non-US issuers purposely seek to do business in the United States by utilizing exchanges such as NASDAQ or the NYSE, and availing themselves of the benefits of listing in the United States, then they are voluntarily responsible for any attendant liability that might result from their choice to do business in US territory.\textsuperscript{225} If they choose not to list in the United States, it is preferable to leave the cause of action in the hands of a court that is better equipped to exert power over non-US issuers and to interpret the laws that such an issuer must abide by.\textsuperscript{226} If international issuers find themselves the target of legal action in the United States, they may raise arguments grounded

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\item \textsuperscript{220} See supra notes 52-54 and accompanying text (explaining effects of US securities litigation upon US financial market).
\item \textsuperscript{221} See supra notes 57-58 and accompanying text (stating that clarity and predictability are two areas in which US securities regulation could be improved).
\item \textsuperscript{222} See supra note 70 and accompanying text (referring to jurisdictions that do not permit securities class actions).
\item \textsuperscript{223} See supra note 57 and accompanying text (suggesting that issuers place a premium on clear and predictable regulations).
\item \textsuperscript{224} See supra notes 51-52 and accompanying text (recognizing the economic risks involved with the US legal system).
\item \textsuperscript{225} See supra note 20 and accompanying text (referring to the rules issuers on American exchanges must adhere to).
\item \textsuperscript{226} See supra note 71-74 and accompanying text (referring to the regulatory schemes in place elsewhere).
\end{enumerate}
in foreign law in their defense.\textsuperscript{227} US courts may be ill-suited to evaluate such arguments.\textsuperscript{228} Moreover, there is a risk of ending up with a judgment that is unenforceable in the issuer's home state.\textsuperscript{229} To go through the rigmarole of litigating in the United States, only to achieve a moral victory is probably not what the plaintiff, or the plaintiff's attorney, are looking for.\textsuperscript{230}

D. Risks Presented by Abusive Litigation

The United States should not open itself up to plaintiffs hoping to take advantage of the United States' entrepreneurial legal system with the aid of attorneys willing to search every securities transaction with a fine-toothed comb to find some tenuous connection to the United States.\textsuperscript{231} Moreover, cases that can be resolved elsewhere should not crowd the federal court docket.\textsuperscript{232} To do so is an unnecessary use of a contracting pool of resources.\textsuperscript{233}

It could, however, be argued that US courts now know better, and are better able to efficiently discern what is actionable under § 10(b) thanks to the prior case law surrounding the conduct-and-effects test.\textsuperscript{234} Furthermore, a two-part test, while approachable on paper, might actually be a difficult bar for the plaintiff to meet.\textsuperscript{235} Plaintiffs would have to show both relevant conduct and substantial effects before proceeding with the litigation, whereas they only had to show one of the two before

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\item \textsuperscript{227} See supra note 72 and accompanying text (providing examples of foreign law that might be involved in an issuers' defense).
\item \textsuperscript{228} See supra note 74 and accompanying text (referring to the differences between a civil law system and a common law system).
\item \textsuperscript{229} See supra note 92 and accompanying text (referring to a German law restricting venue for securities fraud actions to the issuer's home state).
\item \textsuperscript{230} See supra note 46 and accompanying text (referring to the interests of plaintiffs and their attorneys).
\item \textsuperscript{231} See supra note 166 and accompanying text (referring to the initiatives of plaintiffs' firms).
\item \textsuperscript{232} See supra notes 102-03 and accompanying text (referring to the limited resources of the US federal court system).
\item \textsuperscript{233} See supra notes 102-03 and accompanying text.
\item \textsuperscript{234} See supra notes 117-27 and accompanying text (referring to the range of case law available on the conduct test and the effects test).
\item \textsuperscript{235} See supra note 134 and accompanying text (explaining how the conduct-and-effects test could be a difficult standard to meet).
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Such a standard would, however, leave the door wide open to creative pleading, which has previously been deemed problematic.

More importantly, a high standard might also encourage plaintiffs to commence nuisance suits in efforts to purposefully distract corporations. Corporations hoping to limit the costs of discovery and defending a claim, in addition to the negative publicity that could affect their costs of capital, might continue with the practice of reaching a settlement agreement in the interests of efficiency rather than encouraging truly meritorious cases. These costs are unnecessary expenses that the securities industry would have to shoulder. Meanwhile, Morrison offers a degree of swiftness in resolving the applicability of §10(b) as the primary question is the location of the transaction. This test could also be more cost-effective if issuers clearly identified the location of the transaction in the agreement pertaining to the sale, thus reducing the costs of having to obtain that information.

E. Institutional Investors

Dodd-Frank also mentions the possibility of restricting the availability of a broader private right of action to institutional investors only. Pension funds would likely benefit the most from the use of the conduct-and-effects test. Nevertheless, the general public usually wishes to have their day in a domestic court. Not every investor is part of a pension fund, and larger investment firms tend to impose minimum investment

236. See supra notes 134–36 and accompanying text (discussing the practical implications of the conduct-and-effects test).
237. See supra note 167 and accompanying text (referring to the risk of creative pleading).
238. See supra notes 49–50 and accompanying text (explaining problems associated with nuisance litigation).
239. See supra note 48 and accompanying text (recognizing the practice of settling claims without litigation).
240. See supra note 57 and accompanying text (referring to the cost of litigation affecting the securities industry).
241. See supra note 137–38 and accompanying text (providing the transactional test imposed by Morrison).
242. See supra note 36 and accompanying text (suggesting that the private action under §10(b) be limited to institutional investors).
243. See supra note 65 and accompanying text (explaining how pension funds are involved in securities class action suits).
requirements that can be difficult to meet. Furthermore, institutional investors like investment banks and hedge funds have also been sued by their shareholders under § 10(b), for issues such as poor risk management practices. Additionally, extraterritoriality might not even be an issue considering the highly global nature of such institutions. For example, the international offices of firms such as The Goldman Sachs Group, Inc., or Credit Suisse Group AG could be protected by a test like Morrison, but they have domestic operations that are fully within the purview of § 10(b).

Limiting the private right to institutional investors is, however, counterintuitive. An institutional investor probably possesses greater knowledge and understanding of market forces, and would therefore be less susceptible to securities fraud, or could take proactive steps to prevent it. Thus, the private right of action under § 10(b) might be rarely used in practice.

The factors that Congress provided for the SEC's consideration as listed in § 929Y of the Dodd-Frank Act would likely point the SEC toward rejecting the extension of the conduct-and-effects test to private rights of action. Successful international cooperation in controlling securities markets calls for the transactional test in Morrison. The economic risks associated with the conduct-and-effects test, not to mention its procedural shortcomings, outweigh its benefits. Furthermore, the interests of American investors are not seriously undermined. Morrison was correctly decided and should not be overturned.

CONCLUSION

Extending the conduct-and-effects test, thereby extending the extraterritorial reach of US securities law, to private rights of action is problematic as a matter of international comity. This is due to the fact that jurisdictions prefer to approach securities fraud differently, as some jurisdictions prefer law enforcement over litigation. Moreover, jurisdictions define ideas pertaining to securities fraud differently. These differences are pivotal in

244. See supra note 164 (citing Cornwell v. Credit Suisse Group, No. 08 Civ. 3758, 2010 U.S. Dist. LEXIS 76543, involving a securities fraud action against an investment bank).

245. See supra note 66 and accompanying text (noting the general globalization of commerce).
determining who wins and who loses in high stakes litigation. In the interest of global financial stability and cooperation, which is very much needed at the present time, it would be unwise to impose US securities law upon non-US issuers, or upon non-US stock exchanges. As it is, international issuers have to balance the regulatory requirements of their home states with the rules of the particular securities exchange on which they have listed their shares. The United States should be very clear as to what is expected of non-US issuers to help them navigate, and comply with, the complexities of the American regulatory framework.